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Federal Communications Commission
Office of the Secretary

In re Applications of

CRYSTAL CLEAR COMMUNICATIONS, INC.

THE RADIO MINISTRIES BOARD OF
VICTORY CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

For a Construction Permit for
a New FM Station on Channel 240A
Seelyville, Indiana

) MM Docket No. 92-62

) File No. BPH-901214MA

) File No. BPH-901217MJ

To: The Review Board

REPLY TO OPPOSITION TO MOTION TO DISMISS

The Radio Ministries Board of Victory Christian Center Assembly of God, Inc. (the "Radio Board"), by counsel, herein submits its reply to the "Opposition to Motion to Dismiss Notices" ("Opposition") filed July 1, 1992 by Crystal Clear Communications, Inc. ("Crystal").¹ In reply, the following is stated:

Crystal concedes that its appeal of Administrative Law Judge Frysiak's dismissal of its application was required to be filed within five days of the release of Judge Frysiak's June 11, 1992 Memorandum Opinion and Order, FCC 92M-657 ("MO&O"). Thus, Crystal's appeal -- and not simply a notice of appeal -- was due to be filed by June 18, 1992. As it now stands,

¹ The Certificate of Service attached to Crystal's Opposition does not include counsel for the Mass Media Bureau, in violation of Section 1.211 of the rules.

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according to Crystal's Request for Leave to File Appeal Out of Time ("Request") also filed July 1, 1992, the earliest that Crystal's appeal will be filed is July 12, 1992 and likely even later.²

Crystal maintains that the McFadden Evans & Sill law firm, which apparently now represents it,³ was not retained until the afternoon of June 22, 1992. Based upon that counsel's "incorrect assumption" that this proceeding was terminated through the dismissal of Crystal's application, it filed a notice of appeal that day. These facts, Crystal suggests, justify its late filing.

As an initial matter, the fact Crystal's counsel chose to act on an "assumption" rather than facts -- facts which could have been readily ascertained through a telephone call or visit to the FCC's Docket Branch or the Presiding Judge's office, or even through review of the MO&O⁴ -- does not justify Crystal's failure to follow the correct procedural rules. Moreover, Crystal apparently chose to sit on its "assumption" rather than to confirm it during the week between the time new counsel was retained and the June 29, 1992 filing of Radio Board's motion to dismiss Crystal's late-filed notice of appeal.

² Rather than promptly file its substantive appeal with a request for leave to file late, thereby shortening the delay, Crystal chose to file only a request leave to file late. In its Request -- which Radio Board also is opposing today -- Crystal asks that it be given until July 7, 1992, or five days after the Review Board acts on its Request, whichever is later, to file its substantive appeal. Since, as of today, Crystal's Request remains pending and the earliest that Request would be granted is July 7, 1992, after review of Radio Board's opposition being filed today, Crystal's appeal would not be due until July 12, 1992, at the earliest, if its Request were granted as proposed. Indeed, since Crystal did not send a courtesy copy of its Opposition or its Request to the Review Board, the Board had not even received a copy of either pleading as of noon, July 6.

³ As noted below, attorney Stanley Emert also has filed a Notice of Appeal on behalf of Crystal. Crystal has not filed any notice stating that Mr. Emert has withdrawn as its counsel.

⁴ The MO&O did not say that Radio Board's application had been granted or that the proceeding had been terminated.

3.

But more importantly, it is not the actions of Crystal's new counsel, which are at issue, but the actions of Crystal, the applicant. And there is no explanation in Crystal's Opposition as to why it did not take any steps to file or seek to file an appeal prior to June 22, 1992.⁵ Indeed, it is apparent that up to the time the appeal was due and continuing until at least June 22, 1992, Crystal was represented by its original counsel, Stanley Emert, who also filed a late Notice of Appeal on Crystal's behalf. Crystal, therefore, simply has not demonstrated good cause for missing the filing deadline.

Unable to justify its latest in a string of failures to comply with the Commission's rules, Crystal resorts to the argument that no one would be hurt by its dilatory actions. That simply is not the case. The fact is Crystal's failure to meet the appeal deadline has eliminated the possibility that, if the ALJ's MO&O were reversed and Crystal reinstated, the August 26, 1992 date set for hearing could be met. Specifically, if it had been timely, Crystal's appeal would have been filed on June 18, 1992, and the Radio Board's opposition would have been filed five days later, on June 25.⁶ Thus, the Review Board would have had before it all of the pleadings necessary to make a decision on Crystal's appeal as of June 25, 1992. With prompt action on the appeal, and in the event that appeal were successful,⁷ it would have been possible

⁵ Crystal's Opposition makes a general reference to the shortness of the 5-day appeal time and notes that the "problem" was exacerbated by the fact Crystal's prior counsel had recently relocated to Seattle and is extremely difficult to reach by phone. However, Crystal does not claim that the MO&O dismissing its application was received too late for a timely appeal to have been filed.

⁶ This date is based upon Crystal making hand delivery of its appeal, as it did with its Opposition. Otherwise, the deadline would have been June 30, 1992. (Replies are not permitted unless requested.)

⁷ Radio Board, of course, rigorously opposes overturn of that dismissal.

4.

to have held a new prehearing conference, conducted discovery and prepared for hearing in time to meet the August 26, 1992 hearing date. However, by filing its appeal nearly a month late, Crystal will render the August 26 hearing date infeasible. Thus, Crystal's failure to follow the Commission's rules will have disrupted the proceeding, nullifying the current procedural dates to the potential prejudice (if Crystal's application were reinstated) of the Radio Board, the integrity of the Commission's processes, and the Seelyville public, which would then face an even longer wait for initiation of a new FM service.⁸

Moreover, when applicants enter the FCC's administrative arena, they do so on the assumption that all applicants are bound by the same rules, procedural and substantive. When an applicant such as Crystal is allowed to flaunt those rules, repeatedly, the integrity of the administrative process is damaged. Dismissal of Crystal's Notices of Appeal is therefore not only justifiable, it is called for.

Crystal notes that the Review Board has "historically been loathe" to reject appeals because of late filing, citing CSJ Investments, Inc., 67 RR 2d 1648 (Rev. Bd. 1991), rev denied, FCC 90-406 (released December 7, 1990). In CSJ, an appeal was late-filed by three business

⁸ Thus, Crystal's reliance upon Burwood Broadcasting of Memphis, Ltd., 60 RR 2d 123 (Rev. Bd. 1986), is misplaced. Citing Burwood, Crystal urges that the five-day rule of Section 1.301(c)(2) is only to avoid disruption to ongoing proceedings, suggesting that its failure to follow that rule is a minor matter. In fact, Burwood, wherein the Review Board denied an appeal which was late-filed and, even if not untimely, without merit, does not discuss the basis of Section 1.301(c)(2). Moreover, Crystal's late filing would, in fact, disrupt the proceeding if the ALJ's MO&O dismissing its application were reversed.

days⁹ where an applicant believed it had an extra three days for mailing.¹⁰ Although the Board reviewed and then denied the applicant's appeal, it also noted that, as a procedurally defective pleading, that appeal properly was subject to immediate dismissal. Here, Crystal's appeal will be filed three or four weeks late. Its failure to file by June 18 was not caused by a misinterpretation of the rules but by its own (unexplained) inaction. Thus, no good cause for its late filing has been demonstrated, rendering Crystal's appeal "subject to immediate dismissal."

In SBM Communications, Inc., FCC 92-229 (released June 3, 1992), ¶ 2, the Commission warned applicants of the consequences of late filings, noting that lack of timeliness would provide a "sound reason for denial" of an appeal without further consideration. While affirming the Review Board's decision to address the merits of the untimely appeal at issue there, the Commission admonished other applicants that "we wish to make clear that we will not hesitate to summarily dispose of such procedurally deficient matters where circumstances warrant such actions in the future." Crystal's procedurally deficient appeal, therefore, should be summarily rejected.¹¹

⁹ The appeal was filed 12 days after release of the dismissal order, not 12 days late, as Crystal maintains.

¹⁰ WMID, Inc., 14 RR 2d 769 (Rev. Bd. 1968), also cited by Crystal, also involved an appeal filed three days late because of a misinterpretation of the three-day mailing rule.

¹¹ And, correspondingly, Crystal's Request for Leave to File Appeal Out of Time should be denied.

6.

WHEREFORE, In light of the foregoing, the Motion to Dismiss Notices of Appeal filed June 29, 1992 by the Radio Ministries Board of Victory Christian Center Assembly of God, Inc. should be GRANTED and the Notices of Appeal filed by Crystal Clear Communications, Inc. on June 22 and June 23, 1992 should be DISMISSED.

Respectfully submitted,

THE RADIO MINISTRIES BOARD
OF VICTORY CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

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July 6, 1992

CERTIFICATION OF SERVICE

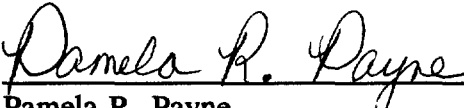
I, Pamela R. Payne, hereby certify that on this 6 day of July, 1992, copies of the foregoing **REPLY TO OPPOSITION TO MOTION TO DISMISS** were hand delivered or mailed, first class, postage prepaid, to the following:

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